1998

Randi Hebertson v. Bank One : Brief of Appellee

Utah Court of Appeals

IN THE UTAH COURT OF AI MENT

RANDI HEBERTSON, Plaintiff, v. BANK ONE, UTAH, N.A., formerly known as VALLEY BANK & TRUST COMPANY, and DIME SAVINGS BANK OF NEW YORK, FSB, dba WILLOWCREEK PLAZA, WILLOWCREEK SHOPPING VILLAGE, LTD., and WILLOWCREEK PLAZA EXECUTIVE OFFICES, Defendants.	)	980226 Priority 15 Appeal No. 98-0226

BRIEF OF APPELLEE

Appeal From an Order of the
Third Judicial District Court of Salt Lake County,
The Honorable Judge Timothy R. Hanson presiding,
Granting Summary Judgment Dismissing Plaintiff's Complaint

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STATEMENT OF JURISDICTION

Plaintiff Randi Hebertson appeals an order granting summary judgment on behalf of defendants Bank One, Utah, N.A. formerly known as Valley Bank & Trust Co. and Dime Savings Bank of New York, FSB, allegedly doing business as Willowcreek Plaza, Willowcreek Shopping Village, Ltd., and Willowcreek Plaza Executive Offices. The Honorable Timothy R. Hanson entered the order on April 8, 1998.

This Court has jurisdiction over plaintiff's appeal pursuant to Utah Code Ann. § 78-2a-3(2)(j) by virtue of the Utah Supreme Court's transfer of plaintiff's appeal pursuant to Rule 42 of the Utah Rules of Appellate Procedure. Plaintiff filed a notice of appeal on May 7, 1998 in the trial court and subsequently submitted a Statement of Issues on Appeal on May 18, 1998, and a docketing statement on May 28, 1998.

ISSUES PRESENTED FOR REVIEW

The following issues are presented for review:

1. Is a complaint which is timely filed but which names as the only defendant a non-entity not capable of being sued eligible for refiling pursuant to Utah Code Ann. § 78-12-40 when it is dismissed without prejudice after the expiration of the applicable statute of limitations?
2. If § 78-12-40 does apply, does it allow plaintiff only one refiling or may she continually avoid the statute of limitations by filing successive complaints

so long as each refiling occurs within one year of the most recent dismissal?

3. Regardless of the number of refilings plaintiff is allowed, may she name new parties not named in the original complaint after the statue of limitations has run, and do those efforts relate back to the original complaint thereby avoiding the expired four-year statute of limitations governing her claims?

STANDARD OF REVIEW

Defendant's Rule 12(b)(6) motion to dismiss was treated by the trial court as a Rule 56 motion for summary judgment since matters outside the pleadings were considered.

The trial court's ruling granting summary judgment on behalf of defendants is subject to review for correctness. Ong International (U.S.A.) Inc. v. 11th Avenue Corp., 850 P.2d 447, 452 (Utah 1993). Therefore, the trial court's legal determinations are given no deference and the grant of a summary judgment and the affirmance of such on appeal is appropriate only where there exists no genuine issues of material fact relevant to the disposition of the claims underlying the motion. L & A Drywall, Inc. v. Whitmore Constr. Co., 608 P.2d 626 (Utah 1980).

DETERMINATIVE STATUTES

Utah Code Ann. §78-12-40 (1953), otherwise known as the savings statute, is the determinative statutory provision presented for review. It states as follows:

> If any action is commenced within due time and a judgment thereon for the plaintiff is reversed, or if the plaintiff fails in such action or upon a cause of action otherwise than upon the merits, and the time limited whether by law or contract for commencement the same shall have expired, the plaintiff, or if he dies and the cause of action survives, his representatives, may commence a new action within one year after the reversal or failure.

STATEMENT OF THE CASE

On May 23, 1997, plaintiff filed a complaint in the Third District Court alleging that on December 31, 1988 she was injured in a slip and fall that occurred on premises owned by defendants. (R. 1-2) This was not plaintiff's first attempt to pursue litigation over this incident. In fact, plaintiff had filed three previous complaints, all in Third District Court, each seeking relief for her alleged injuries stemming from the December 31, 1988 incident. (R. 2-5) Only the first complaint was timely filed within the applicable statute of limitations for personal injuries which is four years. (R. 2, 53-62)

However, each of the first three complaints were dismissed without prejudice. The first two were dismissed pursuant to motions filed by parties not named in the actions but who were served with process. In the first and second actions plaintiff named as the sole defendant "Willowcreek Plaza," which in reality is merely the name on the building where plaintiff's slip and fall occurred. The third complaint was

voluntarily dismissed by plaintiff. (R. 5, 15) When plaintiff filed her fourth complaint naming new defendants not named in the original complaint, defendants moved to dismiss the complaint. (R. 12) Defendant's motion argued that plaintiff was only entitled to refile her complaint once under Utah's savings statute found at Utah Code Ann. § 78-12-40 (1953) and that even if she was entitled to multiple refilings, she could not name new parties who were not named in the original complaint or who did not have an identity of interest with the original defendant. (R. 15-20).

The Honorable Judge Timothy R. Hanson granted defendants' motion. Since he considered matters outside the pleadings, defendant's motion to dismiss was treated as a motion for summary judgment. (R. 92/32 & 83) The order granting summary judgment was signed on April 8, 1998. (R. 82)

It is from this order dismissing plaintiff's fourth complaint that she now appeals, having filed a notice of appeal on May 7, 1998. (R. 85)

STATEMENT OF FACTS

1. Plaintiff's complaint alleges that she was injured in a slip and fall that occurred on the premises of a business complex known as "Willowcreek Plaza" on December 31, 1988. (R. 2)
2. On or about November 20, 1992, nearly four years after the incident and only 38 days short of the expiration of the four-year statute of limitation set forth at Utah Code Ann. § 78-12-25(1) (1953), plaintiff filed a complaint in the Third District Court. (R. 3, 53)

3. This first of four complaints named as the sole defendant "Willowcreek Plaza." (R. 3)

4. Plaintiff served her first complaint on Willowcreek Plaza, L.C., the owner of the premises at the time the complaint was filed. (R. 15) See, also Hebertson v. Willowcreek Plaza, 923 P.2d 1389, 1390 (Utah 1996), a copy of which is included as part of the record on appeal. (R. 71)

5. However, Willowcreek Plaza, L.C., did not own the property at the time of the alleged incident and instead had purchased it from an interim owner who had purchased it, Valley Bank and Dime Savings Bank who jointly owned the premises at the time of plaintiff's slip and fall. (R. 72-73)

6. Willowcreek Plaza L.C. filed a motion to dismiss shortly thereafter arguing that it did not own the building at the time of the incident and that the named defendant "Willowcreek Plaza" was merely the name on the building and did not exist as an entity that could sue or be sued. (R. 3, 15, 72-73)

7. The Honorable Judge Leslie Lewis granted the motion to dismiss that in fact "Willowcreek Plaza" did not have the capacity to be sued and that Willowcreek Plaza L.C. did not own the premises at the time of the incident. (See certified copies of Judge Lewis' ruling and order attached as Exhibit A to the addendum of defendant's brief herein.)

8. The order dismissing plaintiff's first complaint without prejudice was

signed on September 22, 1993, over nine months after the statute of limitations expired. (R. 3-4; see also, Exhibit A of addendum)

9. Plaintiff then filed her second complaint on September 17, 1993 and again named as the sole defendant "Willowcreek Plaza." (R. 4 & 56)

10. However, this time plaintiff served Valley Bank. (R. 4 & 15)

11. Because they were not named as parties, Valley Bank and Dime Savings moved to dismiss on the grounds that they were not doing business as "Willowcreek Plaza." Id.

12. Plaintiff opposed the motion arguing that the banks were in fact doing business as "Willowcreek Plaza" pursuant to Rule 17(d) of the Utah Rules of Civil Procedure. (R. 73)

13. The Honorable Judge John A. Rokich ruled that the banks were indeed not doing business as "Willowcreek Plaza" and as such plaintiff could not bring suit against them in that name. (R. 4) He therefore dismissed plaintiff's second complaint without prejudice. Id.

14. The order dismissing this second lawsuit without prejudice was entered on January 17, 1994. Id.

15. Plaintiff then filed her third complaint on January 6,1994, this time naming Valley Bank and Dime Bank. (R. 5, 59)

16. Plaintiff never pursued this action and instead chose to pursue an appeal of Judge Rokich's decision dismissing the second complaint. (R. 5)

17. Plaintiff voluntarily dismissed her third complaint on February 22, 1994. (See, certified copy of plaintiff's Notice of Dismissal attached as Exhibit B to the addendum of defendant's brief herein.)

18. Plaintiff's appeal of the dismissal of her second complaint was unsuccessful on two separate occasions.

19. Specifically, the Utah Court of Appeals affirmed the dismissal, agreeing that Valley Bank was not doing business as "Willowcreek Plaza" and therefore could not be sued in that name. Hebertson v. Willowcreek Plaza, 895 P.2d 839 (Utah Ct. App. 1995); see also (R. 63-65)

20. Plaintiff thereafter filed a petition for writ of certiorari which was granted. Hebertson v. Willowcreek Plaza, 910 P.2d 425 (Utah 1995).

21. The Utah Supreme Court affirmed the court of appeals ruling. Hebertson v. Willowcreek Plaza, 923 P.2d 1389 (Utah 1996); see also (R. 71-74)

22. Plaintiff thereafter filed her fourth complaint on May 23, 1997. (R. 1-7)

23. Defendants again moved to dismiss plaintiff's fourth complaint arguing that the savings statute allows only one refiling and that the statute of limitations therefore barred plaintiff's fourth complaint. (R. 12-20)

24. Defendants further argued that even if plaintiff was entitled to more than one refiling she could not add or name new parties not named in her first complaint. Id.

25. In opposition, plaintiff argued that the Utah savings statute allows for more

than one refiling and that regardless of how she referred to defendants in her various complaints, her cause of action had always been the same. (R. 23-33)

26. Plaintiff also argued that the banks were doing business as "Willowcreek Plaza" and that her efforts in substituting the banks' names as the designated defendants in her fourth complaint did not impair her right to rely on the savings statute. (R. 29)

27. Plaintiff also informed the trial court in her written opposition to defendants' motion to dismiss that she had initiated a legal malpractice lawsuit against her original attorney in the Third District Court styled Hebertson v. Dalby et. al., Civil No. 960908024, filed November 20, 1996, the Honorable Glenn K. Iwasaki presiding. (R. 27)

28. After reading the briefs and listening to the oral argument of the parties, The Honorable Timothy R. Hanson granted defendant's motion to dismiss plaintiff's complaint on March 13, 1998. (R. 92/32)

29. Because matters outside the pleadings were considered, the trial court treated the motion to dismiss as one for summary judgment and ruled that plaintiff was entitled to only one refiling after her first complaint was dismissed. (R. 83)

30. The trial court further ruled that even if plaintiff was entitled to more than one refiling, she could not name new parties after the expiration of the

statute of limitations. (R. 83)

31. The order dismissing plaintiff's fourth complaint was entered on April 8, 1998 and plaintiff filed her notice of appeal on May 7, 1998. Id.

SUMMARY OF ARGUMENT

Plaintiff's first complaint which was timely filed was a complete nullity for it named as the sole defendant "Willowcreek Plaza," the name of the building where plaintiff alleges her injuries were sustained. "Willowcreek Plaza" is a non-entity. It was not a business, a dba, or the common name of the actual owners of the premises. As such, "Willowcreek Plaza" could not sue or be sued. Therefore, the dismissal of plaintiff's first complaint after the expiration of the statute of limitations did not trigger the provisions of Utah Code Ann. § 78-12-40 otherwise known as Utah's savings statute which allows suits not dismissed upon the merits to be refiled after the intervening statute of limitations has expired.

Put in other words, a suit which names a non-existent defendant who cannot be sued and thereafter serves the complaint on an entity that has nothing to do with plaintiff's claims is a complete nullity as if it were never filed in the first place. Thus, when the statute of limitations expired, plaintiff had not timely initiated a lawsuit against defendants and the statute of limitations bars all subsequent efforts on her part to sue the proper parties.

Even if plaintiff was entitled to refile her complaint under the savings statute, she is entitled to do so only once pursuant to the clear language of § 78-12-40. The Utah

Court of Appeals in the case of Meadow Fresh Farms v. Utah State University, 813 P.2d 1216, 1221 n. 10 (Utah Ct. App. 1991) has already indicated, albeit in dicta, that the savings statute allows for only one filing. Such is consistent with the clear majority of jurisdictions who have addressed the issue to date. Thus, when plaintiff's second lawsuit was dismissed, and that ruling was upheld on appeal by both the Utah Court of Appeals and the Utah Supreme Court, plaintiff was barred by the statute of limitations from filing subsequent complaints. To rule otherwise and allow multiple successive refilings so long as each is brought within one year of the last dismissal would defeat the purpose and intent of statutes of limitation and could result in endless litigation.

Finally, even if Utah's savings statute allows for more than one refiling, Utah law is clear that new parties may not be added or joined in subsequent filings after the expiration of the statute of limitations unless it can be shown that the causes of action are the same and the parties are either the same or bear a substantial identity of interest with the original parties. Here, plaintiff was unable to demonstrate that defendants were doing business as "Willowcreek Plaza" nor was she able to establish an identity of interest between a non-entity ("Willowcreek Plaza") and defendants who were the actual owners of the property at the time. This much has been confirmed by the Utah Court of Appeals and the Utah Supreme Court, both of which have issued opinions addressing plaintiff's Rule 17(d) arguments following the dismissal of plaintiff's second complaint. Plaintiff's efforts to join defendants as parties in the second and third refilings of her original complaint are therefore improper and cannot stand in light

of the expired statute of limitations.

In short, plaintiff sued a non-entity and served the wrong owner of the building when she initiated her first lawsuit. She has now filed a total of four lawsuits and each has been dismissed. Her procedural efforts have been scrutinized by three trial court judges and by both appellate courts of this state in an appeal, a petition for writ of certiorari, and the Supreme Court's review of the decision of the Court of Appeals. Plaintiff's legal and equitable arguments if accepted would eviscerate the statute of limitations and leave all potential defendants no end in sight to the litigation possibilities.

Defendant therefore requests that the trial court's ruling be affirmed

ARGUMENT

POINT I

Plaintiff's first complaint naming a non-existent defendant is a complete nullity. Utah Code Ann. § 78-12-40 therefore does not apply and Plaintiff's three subsequent refillings are barred by the statute of limitations

Plaintiff's first complaint was filed on November 24, 1992, just 38 days prior to the four-year statute of limitations deadline for filing litigation with respect to the slip and fall she claims occurred on December 31, 1988. (R. 14-15) That complaint named as the sole defendant "Willowcreek Plaza." (R. 15) Because Willowcreek Plaza was a non-entity and was incapable of suing or being sued, plaintiff's first complaint was dismissed pursuant to a motion to dismiss filed by the new owners of the building who

had been served with process.[1]

The order dismissing plaintiff's first complaint was issued in September of 1993, well over nine months after the applicable statute of limitations had expired. Because that complaint never named the appropriate defendant and in fact named a defendant that did not exist, the savings statute found at Utah Code Ann. §78-12-40 (1953) cannot operate to preserve a claim against a party who was never named, served, or joined as a party to the original action prior to the expiration of the statute of limitation.

The case of Estate of Haro v. Haro, 887 P.2d 878 (Utah Ct. App. 1994), demonstrates this principle in action. In Haro, the Utah Court of Appeals upheld the dismissal of a wrongful death lawsuit due to the would-be claimant's failure to name a plaintiff that had the capacity to sue on behalf of the heirs of the deceased. Plaintiffs had sued in the name of the "Estate of Martin Haro." Id. They filed their complaint six weeks before the statute of limitations ran. Id.

The defendants in Haro thereafter filed a motion to dismiss after the statute of limitations had run arguing that plaintiff had brought the suit in the name of an entity that did not have the capacity to sue. Plaintiffs moved to substitute the proper party pursuant to Rule 17(a) of the Utah Rules of Civil Procedure. The trial court denied the motion to substitute and dismissed the suit, ruling that plaintiffs had not initiated suit

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[1] It goes without saying that even if plaintiff had named Willowcreek Plaza, L.C. in the first action the complaint would have been dismissed anyway because they did not own the property at the time of plaintiff's accident.

within the two year statute of limitations. Id. The Haro court held that since the suit was brought by a party that lacked the capacity to bring the claim the lawsuit was "a nullity" and therefore there was no suit or "cause of action in which to substitute parties." Id. at 879. Thus, even though the original suit was timely filed, the error in naming the proper party effectively wiped that suit clean from the books resulting in the expiration of the statute of limitations which barred further refilings. Id. at 879, n. 2.

Dunn v. Kelly, 675 P.2d 571 (Utah 1983), is also on point. In Dunn, the original plaintiff filed a timely wrongful death lawsuit over the death of a purported relative. When it was determined that the plaintiff in the original action was in fact not related to the decedent, the case was dismissed without prejudice.[2] Id. Thereafter, a new second action was commenced, this time naming as plaintiffs the proper heirs. However, the second action was clearly filed after the two year statute of limitations had run. Id. at 572. The trial court dismissed the second complaint holding that the statute of limitations barred the second action and the Utah Supreme Court affirmed. The parties in the first action were not the same as those named in the second action and § 78-12-40 therefore did not apply and could not be used to resurrect their claims. Id.

The Haro and Dunn decisions are consistent with case law from other jurisdictions who have addressed this issue from the perspective of a wrongly named defendant. In McCoy Enterprises v. Vaughn, 268 S.E.2d 764 (Ga. App. 1980), the

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[2]As in this case, the original suit in Dunn was dismissed well after the statute of limitations for wrongful death claims expired. Id. at p. 571-72

Georgia Court of Appeals reversed a trial court ruling that allowed the plaintiffs to file a second lawsuit under Georgia's savings statute after the statute of limitations had run and the first timely action had been dismissed. The first suit incorrectly named the officers of the corporation as the defendants rather than the corporation itself. Id. at 765. In so ruling, the court discussed plaintiff's ineligibility for refilling under the savings statute.

> If the cause of action is the same in both cases; if by the same party or his legal representative, and against a person from whom relief was prayed in the first suit, the second action may be renewed. Since appellant corporation was never a party to the original suit, appellee cannot maintain a "renewal" action against it in light of the intervening statute of limitation.

Id. (citations omitted)

Similarly, in Jordan v. Commissioners of Bristol County, 167 N.E. 652 (Mass. 1929), the Massachusetts Supreme Court held that actions which fail because they were brought against the wrong party are not eligible for the savings statute. Id. at 654.

In, Day v. NLO Inc., 798 F.Supp. 1322 (S.D. Ohio 1992), the U.S. District Court for Ohio, ruled that even though the causes of action were the same, plaintiff's efforts to name different defendants in the second lawsuit rendered the Ohio savings statute inapplicable and the statute of limitations barred the second complaint. Id. at 1328 (citing Heilprin v. Ohio State University Hospitals, 508 N.E.2d 187 (Ohio 1986).

The same result was reached in Brown v. Hartshorne Public School Dist. No. 1, 926 F.2d 959 (10th Cir. 1981). In Brown, the Tenth Circuit Court of Appeals interpreted

Oklahoma's savings statute and held that the plaintiff's efforts to name new defendants in a second action who were not named in the first action was improper and the savings statute, while applicable to the second action generally, did not apply to causes of action raised against new parties. The second lawsuit was therefore dismissed as untimely insofar as to the new defendants the statute of limitations had run. Id. See also, Goldsmith v. Learjet, Inc., 90 F.3d 1490 (10th Cir. 1996) (interpreting the Kansas savings statute).

In Bavel v. Cavaness, 299 N.E.2d 435 (Ill. App. Ct. 1973), an Illinois appellate court held that the original suit which was otherwise timely filed but which named as a defendant a party that did not legally exist and could not be sued, was a "complete nullity" and the plaintiff's second or refilled suit naming the proper defendant was therefore not eligible for the Illinois savings statute and was properly barred by the statute of limitations. Id. at 438. The ruling of the Bavel court is worth noting here.

> A case which was legally never in existence cannot be dismissed or nonsuited for it was a nullity from its inception and incapable of legally being acted upon. Here, . . . where there was no defendant there was no action capable of being heard on the merits. **Failure to name a defendant is not a mere technicality in procedure or form but constitutes rather a total absence of a cause of action.** The [savings] statute referring to a "new" action pre-supposes an old or prior action filed within the original limitation period and here, as a matter of law, there was no such prior action. It is therefore evident that plaintiffs did not commence a "new" action when they filed the complaint now before us, but

> rather commenced the **only** action, which action was filed well beyond the limitation period allowed.

Id. at 438. Allowing plaintiff's arguments here would eviscerate the statute of limitations.

Even though plaintiff has not arg ed that Rule 15(c) of the Utah Rules of Civil Procedure, which allows amendments to the pleadings to relate back to the original complaint, appiies to her situation, case law interpreting Rule 15(c) is illustrative of this point.

> Generally Rule 15(c), U.R.C.P., will not apply to an amendment which substitutes or adds new parties for those brought before the court by the original pleadings-whether plaintiff or defendant. This [is] for the reason that such would amount to the assertion of a new cause of action, and if such were allowed to relate back to the filing of the complaint, the purpose of a statute of limitation would be defeated.

Perry v. Pioneer Wholesale Supply Co., 681 P.2d 214, 217 (Utah 1984)(citing Doxey-Layton Co. v. Clark, 548 P.2d 902, 906 (1976)).

Plaintiff's efforts to properly name and serve defendants here are untimely and improper. Plaintiff may not renew an action under the savings statute that never existed in the first place. She cannot now sue the proper defendants having failed to name, serve, or join them as defendants in the initial action prior to the running of the statute of limitations. Plaintiff's naming of a defendant who did not exist, and was not a legal entity capable of suing or being sued, rendered that initial action a complete nullity. The statute of limitations bars her efforts to now correct that error.

POINT II

Even if the savings statute applies, plaintiff is only entitled to one re-filing of her complaint, not four.

As indicated in the procedural history, this appeal is from plaintiff's fourth complaint. Therefore, even if §78-12-40 were applicable and plaintiff was entitled to refile her complaint after the first one was dismissed, the savings statute only allows for one refiling, not three.

Utah's savings statute provides:

> If any action is commenced within due time and a judgment thereon for the plaintiff is reversed, or if the plaintiff fails in such action or upon a cause of action otherwise than upon the merits, and the time limited either by law or contract for commencement the same shall have expired, the plaintiff, or if he dies and the cause of action survives, his representatives, may commence a new action within one year after the reversal or failure.

Id. Perusal of this language indicates that the intent of the statue is to allow one refiling, not three as plaintiff has done here.

While this question has not been directly addressed by Utah appellate courts, this Court in dicta has indicated that plaintiff is only entitled to one refiling. Specifically, in Meadow Fresh Farms, 813 P.2d 1216, the Honorable Judge Judith Billings writing for a unanimous panel stated in a footnote that §78-12-40 allowed for only one re-filing.

> Although we refrain from addressing the merits of whether Utah Code Ann. § 78-12-40 permits unlimited successive dismissals and refilings, we note that many of the courts that have been faced with a similar question have concluded that in the interest of finality and judicial economy, a plaintiff is

> entitled to only one refiling pursuant to a savings statute. See e.g., Hunter v. Ward, 15 F.2d 843, 844 (8th Cir. 1926); Marangio v. Shop Rite Supermarkets, Inc., 11 Conn.App. 156, 55 A.2d 1389, 1391 (1987), cert. denied, 204 Conn. 809, 528 A.2d 1155 (1987); Sylvester v. Steinberg, 152 Ill.App.3rd 962, 105 Ill.Dec. 902, 903, 505 N.E.2d 28,29 (1987); United States Fire Ins. Co. v. Swyden, 175 Okla. 475, 53 P.2d 284, 288 (1935). This conclusion is consistent with the language of the Utah saving statute as the statute speaks in terms of a singular rather than multiple dismissals: "**a** new action," "**the** reversal or failure".

Id. at 1221, n.10 (emphasis in original). Here, the trial court specifically found this footnote, albeit dicta, to be much more persuasive than contrary holdings from other states. (R. 92/30)[3]

Plaintiff has cited in her brief to the cases of Roberts v. General Motors Corp., 673 A.2d 779 (N.H. 1996), and Trull v. Seaboard Air Line R.Y. Co., 66 S.E. 586 (N.C. 1909), in support of her argument that she is entitled to an unlimited number of refilings so long as each new action is brought within one year of the previous dismissal. Roberts[4] and Trull cannot be distinguished or reconciled with contrary holdings from other states and the Meadow Fresh dicta. However, the logic underpinning both decisions is irrational and emasculates the principles behind statutes of limitation. They

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[3] At the hearing, Judge Hanson stated the following with respect to Meadow Fresh. "Dicta from Judge Billings is much more persuasive than the holding from some out-of-state court. It's particularly persuasive when I think she's right." (R. 121)

[4] The Roberts court was not unanimous in its decision. Instead, one justice issued a well reasoned dissent addressing concerns of endless litigation and harmonizing the savings statute with the applicable statute of limitations. Id.

also represent the clear minority when compared to jurisdictions who allow for only one refilling.

The following decisions hold that only one refilling is allowed under a savings statute. Morrow v. Atlanta & C. Air Line Ry. Co., 66 S.E. 186 (S.C. 1909)(interpreting South Carolina law); United States Fire Ins. Co. v. Swyden, 475, P.2d 284, 288 (1935)(interpreting Oklahoma law); Turner v. N.C. & St. L. Railway, 285 S.W.2d 122 (Tenn. 1955)(interpreting Tennessee law); Worley v. Pierce, 440 S.E.2d 749 (Ga. App. 1994)(interpreting Georgia law); Rogozinski v. American Food Service Equip., 643 A.2d 300 (Conn. App. 1994)(interpreting Connecticut law); Cady v. Harlan, 442 S.W.2d 517 (Mo. 1969)(interpreting Missouri law); Hunter v. Ward, 15 F.2d 843 (8th Cir. 1926)(interpreting Arkansas law); Sylvester v. Steinberg, 505 N.E.2d 28 (Ill. App., 4 Dist. 1987)(interpreting Illinois law); Bush v. Cole, 110 N.E. 1056 (Ohio 1912) (interpreting Ohio law).

Language from the Swyden opinion addresses the philosophical underpinnings of this majority position which allows only on refilling, not multiple refilings.

> We must remember that the grace period is not a release of the original limitation, nor even an extension thereof for all purposes, but is only a conditional, limited extension granted plaintiff because the suit which he did file in time, consumed some time in court before dismissal, carrying him beyond the original limitation date, possibly without any fault of his own. That he could file and dismiss as often as he desired within the original period of limitation has nothing to do with it, for at that time there was no bar at all. Once, however, he passes the bar he is on the law's own time, and is permitted to ignore the statute only by virtue of legislative exception

> especially created for the occasion. Thus, good reason appears to support the general rule and interpretation of such statutes, to the effect that the legislatures of the various states, in extending litigants the privilege of filing actions out of time, mean just what they express by the words "commence a new action,"and that they do not thereby intend that plaintiffs may file as many new actions as they desire, all within the year. Had that been their intention, then such statutes would have been worded in the language of the ordinary statutes of limitation, with minor changes. To give such an interpretation as desired by plaintiff would do violence to the letter, spirit, meaning, and purpose of the statute.

Swyden 53 P.2d at 288[5].

Similarly, the Rogozinski court ruled that only one refiling is allowed by the Connecticut savings statute. "Here the fire occurred twelve years ago and this is the fourth action started in state court to resolve the dispute. All of the previous dismissals were due to some failure to act on the part of the plaintiff. Thus, it is clear that this is not the situation that [the savings statute] was intended to remedy." Rogozinski, 643 A.2d at 303, n. 9.

In Pintavalle v. Valkanos, 581 A.2d 1050 (Conn. 1990), the Connecticut Supreme Court stated that plaintiff's interpretation of the savings statute "would have the effect of permitting a potentially limitless extension of the time to file succeeding

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[5]Although the facts in Swyden involved multiple refilings (three not including the original) within the one year savings period, the Oklahoma Supreme Court cited affirmatively to other cases where the first refilling occurred outside the original one year savings period. Thus, it does not matter if the second or third refilings occurred within or without the savings period because the statute allowed but one refilling.

actions. This would defeat the basic purpose of statutes of limitation, namely, promoting finality in the litigation process. Although § 52-592 is a remedial statute and must be construed liberally; it should not be construed so liberally as to render statutes of limitation virtually meaningless." Id. at 1052 (citations omitted).

If accepted, plaintiff's arguments here would essentially render the statute of limitations meaningless. It should be noted that §78-12-40 is found within the heart of the Limitation of Actions chapter of the Judicial Code. It therefore must be construed and harmonized to work within the overall purpose of the act.

Plaintiff has exercised her one opportunity to file a lawsuit beyond the applicable statute of limitations assuming § 78-12-40 applies. That filing was dismissed. Plaintiff sought appellate review and obtained two opinions from both appellate courts of this state denying her claims and upholding the dismissal. Since plaintiff is now on her third refilling from which this appeal is taken, she has clearly exceeded the ambit of § 78-12-40 and the trial court's ruling should be upheld.

POINT III

Whether Plaintiff is allowed one or multiple refilings under § 78-12-40, she nevertheless cannot name new parties who were not named in the original complaint and who have no identity of interest to the defendant named in her first complaint.

Plaintiff argues that her efforts to name the correct defendants in this action should relate back to the first complaint which was filed within the applicable statute of limitations. However, the law is clear that one may not add new parties to a lawsuit and have that amendment relate back to the original filing for purposes of preserving the statute of limitations.

At first blush, plaintiff's arguments appear to rely on Rule 15(c) of the Utah Rules of Civil Procedure. This rule governs the relation back of amendments to pleadings and allows a party to amend their existing pleadings and have them relate back to original complaint or filing. However, plaintiff has not argued Rule 15(c) and rightly so. Case law explicitly states that Rule 15(c) does not generally allow amendments to the pleadings to include new parties since such amendments would amount to the assertion of a new cause of action and defeat the very purpose of a statute of limitation. Perry, 681 P.2d at 218.

However, a narrow exception to this general rule allows new parties to be added and related back to the original complaint where there is an identity of interest between the old and new parties. Id. at 217. Here, there is no identity of interest between defendants who actually owned the property at the time of the accident and

"Willowcreek Plaza", a name on a building and the only named defendant in the original complaint and plaintiff's first refilling. "Willowcreek Plaza" is a non-entity. It cannot sue or be sued. Furthermore, both this Court and the Utah Supreme Court have rejected plaintiff's prior assertions that the banks were doing business as Willowcreek Plaza. See Hebertson v. Willowcreek Plaza, 895 P.2d 839 (Utah Ct. App. 1995)(cert. granted at 910 P.2d 425). Hebertson v. Willowcreek Plaza, 923 P.2d 1389 (Utah 1996).

The Dunn case cited above adds further insight to this issue. On appeal, the Utah Supreme Court affirmed the trial court's dismissal of the second action. In so ruling, the court expressly rejected the plaintiff's claims that they were entitled to refile their complaint under Utah Code Ann. §78-12-40 since they did not have any "identity or legal relationship" with the plaintiff in the first and timely filed lawsuit.

> The appellants concede they sought no relief and in fact were not parties to the prior action. They also concede they have no legal relationship to the original plaintiff. . .. Absent any identity or legal relationship between these appellants and the plaintiff in the first suit, it is impossible for this Court to apply § 78-12-40 to them. They simply had no interest in the first suit and are now barred from litigating this case because it is not timely asserted.

Dunn, 675 P.2d at 572.

Admittedly, Dunn deals with a change in plaintiffs as parties. However, the logic of the Dunn opinion should apply to the naming of the incorrect defendant who bears no legal relationship to the ultimately proper defendant.

Williams v. Zortman Mining, Inc., 914 P.2d 971 (Mont. 1996) is also on point. In Zortman, the plaintiff sued the parent company of a wholly owned subsidiary corporation. Zortman actually was employed by the subsidiary and his claims of discrimination in the workplace was in reality against his employer, not its parent company. The federal court dismissed Zortman's claims for his attempt to "manipulate the diversity jurisdiction of the federal court." Id. at 972. He thereafter sued the subsidiary (his employer and the proper party) in state court after the statute of limitations expired. Id.

Citing Turner v. Aldor Co. of Nashville, Inc., 827 S.W.2d 318, 321 (Tenn. Ct. App. 1991), the Zortman court stated : "We . . . .agree that the 'savings statute' does not apply to save or 'renew' a complaint against a party not named in the original complaint." Id. at 973. Zortman goes on to agree with McCoy referenced elsewhere in this brief that the second suit should be dismissed even if the proper corporate defendant had actual notice of the first suit since the first suit failed to name it or a company with whom it held a sufficient identity of interest and the statute of limitations expired before the proper party was sued. Id.

Plaintiff urges this Court to apply the equities of the identity of interest rule and the general principle of fairness that cases ought to be heard on the merits, not disposed of based on technical applications of the law to the facts at hand. While defendants would agree with this principle as a general rule, such equities do not apply to the requirements of naming the correct parties and satisfying the statute of

limitations.

Specifically, plaintiff cites the case of Madsen v. Borthick, 769 P.2d 253-54 (Utah 1988) for the proposition that the Utah Supreme Court has allowed a plaintiff to add a "new defendant" to the second suit filed after the statute of limitations had run.[6] However, a close reading of that opinion shows that the general rule prohibiting the naming of new parties under Rule 15(c) was never raised or addressed by the litigants or the court.[7] Therefore, plaintiff's references to Madsen for the proposition that the Utah Supreme Court allowed the suit to proceed despite the fact that new parties were added is disingenuine and misleading. Defendant is unaware of any case law or rules which allow precedent to be established through issues not addressed, argued or discussed in opinions issued by the appellate courts of this state.

The equities referenced by plaintiff in her citation to Williams v. State Farm Ins. Co., 656 P.2d 966 (Utah 1982), are likewise distinguishable. Plaintiff argues that the dismissals of her four complaints including the instant action were done for mere form-of-pleading errors.[8] However, Williams did not address errors in such critical matters

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[6] See plaintiff's brief, p. 9

[7] The plaintiff's first complaint against Commissioner Borthick in his official capacity and the State of Utah was dismissed due to the plaintiff's failure to comply with the provisions of the Utah Governmental Immunity Act which requires budding litigants wishing to sue the State to file a written notice of claim within one year of the incident giving rise to their claims. Madsen v. Bothick, 658 P.2d 627, 633 (Utah 1983).

[8] See plaintiff's brief, p. 8

as naming and suing the proper parties. Instead, Williams dealt with the proper pleading of factual allegations associated with the affirmative defenses of fraud and misrepresentation.[9] Id. at 967. The court ruled that the defenses were sufficiently plead to put plaintiff on notice of the same. Nowhere in Williams do the relaxed or "liberalized pleading rules" extend to allow a plaintiff to pursue a lawsuit even though they have sued a non-entity or named the wrong defendant.

The case of Jordan v. Commissioners of Bristol County, 167 N.E. 652 (Mass. 1929), is illustrative of the point that the naming of the proper defendant is not a "form-of-pleading" error.

> However, plaintiff, cause of action and defendant cannot be regarded as "form" within this definition. Misnomer or misdescription of any of these substantive elements may be "matter of form," but the mistaken choice of a defendant unrelated to the subject-matter of the case is not merely a formal error.

Id. at 654. Utah courts agree with this position. See, Perry, 681 P.2d at 217. Rule 15(c) does not allow the naming of new parties to relate back to the original filing absent an identity of interest between the old and new parties. See also, Haro, 887 P.2d at 879, n.2. (Plaintiff's first suit was a nullity and plaintiff could not revive their action after the statute of limitations period where the first suit was brought by a plaintiff who lacked the capacity to sue.)

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[9]Williams sued State Farm Insurance Company to collect the face amount of a life insurance policy. In its answer, State Farm alleged that the decedent misrepresented his medical history on his application for the policy.

While this case represents the improper naming of a defendant, the logic of Haro and Perry are on point and demonstrate that naming the proper party is critical to maintaining an action and such errors is pleading cannot be dismissed as minor or excusable under the relaxed "form-of-pleading" rules.

Plaintiff's lawsuit filed against "Willowcreek Plaza" was a nullity. It was brought against an entity that did not exist and lacked the capacity to be sued. As such there is no complaint to which any attempted amendment or addition of new parties could relate back to sufficient to avoid the statute of limitations which ran shortly after plaintiff filed her first complaint and years before she finally named the proper defendants. While plaintiff likely views these arguments as unfair and harsh, they nevertheless comport with Utah law and the purpose of statutes of limitation. See, Lee v. Gaufin, 867 P.2d 572, 575 (Utah 1993) (statutes of limitations "do not abolish a substantive right to sue, but simply provide that if an action is not filed within the specified time, the remedy is deemed to have been waived . . . .The barring of the remedy is caused by a plaintiff's failure to take reasonable steps to assert the cause of action within the time afforded by statute.").

In conclusion, plaintiff failed to take "reasonable steps" to assert her cause of action when she filed her first complaint six years ago. She named a non-entity that lacked the capacity to be sued and she served an entity that had no involvement or relationship to the accident in question. This utter failure on her part to properly initiate her lawsuit when she or her counsel knew they were on the eve of the statute of

limitations expiration date is fatal to her claims and all other efforts including the second, third and fourth complaints cannot revive an action that by law is a nullity and was never filed in compliance with the statute of limitations in the first place.

CONCLUSION

Plaintiff never complied with the statute of limitations in the first place insofar as these defendants are concerned. Even if the savings statute applies to her first dismissal she is entitled to only one refilling, not three. Finally, her efforts to correct her mistake in naming the wrong defendants through amendment or relation back to her original complaint are not proper. Utah law clearly prohibits her efforts to add new parties in subsequent refilings. Therefore, the trial court's dismissal of plaintiff's complaint for statute of limitations purposes should be affirmed.

DATED this 2 day of November, 1998.

SMITH & GLAUSER, P.C.

JOHN CLYDE HANSEN
DANIEL L. STEELE

CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing Brief of Appellee was mailed, postage prepaid, this 2nd day of November, 1998 to the following:

Timothy C. Houpt
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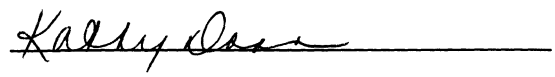


ADDENDUM

A. Certified copies of Judge Lewis' ruling

B. Certified copy of plaintiff's Notice of Dismissal

Tab A

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

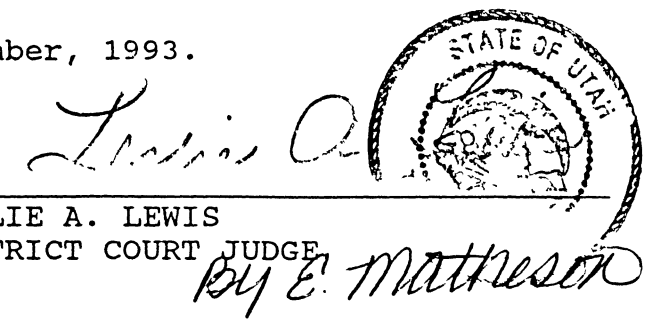
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

RANDI HEBERTSON,	:	**COURT'S RULING**
Plaintiff,	:	**CASE NO. 920906515**
vs.	:	
WILLOWCREEK PLAZA,	:	
Defendant.	:	

A Notice to Submit having been filed, pursuant to Rule 4-501, Code of Judicial Administration, in connection with defendant's Motion to Dismiss, and plaintiff's Motion to Amend, and the Request for Hearing, the Court having reviewed the Motions, the Affidavits in support and Reply Memorandum and the Memoranda in opposition, and the Court being fully advised and finding good cause, rules as stated herein.

The Court denies the Motion for Hearing. The defendant's Motion to Dismiss is granted for the reasons stated in defendant's Memorandum, without prejudice. This Motion having been granted, this Court does not address the Motion to Amend.

Dated this 15th day of September, 1993.



LESLIE A. LEWIS
DISTRICT COURT JUDGE

By E. Matheson

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Court's Ruling, to the following, this 1st day of September, 1993:

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IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR

SALT LAKE COUNTY, STATE OF UTAH

RANDI HEBERTSON, Plaintiff, vs. WILLOWCREEK PLAZA, Defendant.	)	ORDER OF DISMISSAL Civil No. 920906515 Judge Leslie A. Lewis

Defendant's Motion to Dismiss having been decided by the Court pursuant to Rule 4-501(3)(c), Utah Code Jud. Adm., and the Court having issued a written ruling dated September 1, 1993,

IT IS HEREBY ORDERED that the above-entitled action be, and the same is, dismissed without prejudice.

DATED this 22nd ~~day~~ of September, 1993.

BY THE COURT:

Leslie A. Lewis
District Court Judge

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing ORDER OF DISMISSAL was mailed, postage prepaid, on September 7, 1993, to the following:

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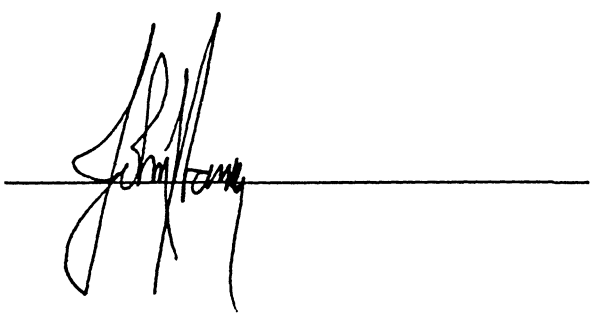

Tab B

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IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

RANDI HEBERTSON, Plaintiff, v. BANK ONE, UTAH, NATIONAL ASSOCIATION, fka VALLEY BANK & TRUST COMPANY, and THE DIME SAVINGS BANK OF NEW YORK, FSB, dba WILLOWCREEK PLAZA, WILLOW CREEK SHOPPING VILLAGE, LTD., WILLOW CREEK PLAZA EXECUTIVE OFFICES, Defendant.	NOTICE OF DISMISSAL Civil No. 940900104 Judge Tyrone E. Medley

Plaintiff, through her undersigned counsel, gives notice pursuant to Rule 41(a)(1) of the Utah Rules of Civil Procedure of the dismissal without prejudice of Plaintiff's actions against Defendants.

DATED this 9 day of February, 1994.

KING & ISAACSON

Brian S. King
Attorneys for Plaintiff

I CERTIFY THAT THIS IS A TRUE COPY OF AN ORIGINAL DOCUMENT FILE IN THE THIRD DISTRICT COURT, SALT LAKE COUNTY, STATE OF UTAH.
DATE: 1/16/96
DEPUTY COURT CLERK